

**REDACTED VERSION OF
EXHIBIT A**

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28
UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF CALIFORNIA

28 LAURI VALJAKKA,
29 Plaintiff,
30 v.
31 NETFLIX, INC.,

Case No. 4:22-cv-01490-JST

**DEFENDANT NETFLIX, INC.'S
PATENT L.R. 3-9 SUPPLEMENTAL
RESPONSIVE DAMAGES
CONTENTIONS**

Defendant.

Judge: Jon S. Tigar

Pursuant to Patent L.R. 3-9 and in response to Plaintiff Lauri Valjakka's ("Valjakka's") damages contentions served on September 1, 2022, Defendant Netflix, Inc. ("Netflix") serves its supplemental responsive damages contentions as follows.

I. PRELIMINARY STATEMENT

8 Founded in 1997, Netflix is a leading subscription streaming service and content production
9 company based in Los Gatos, California. Valjakka is a citizen of Finland who alleges to have
10 developed a “working software system for the patented systems,” but whose alleged system is
11 currently not being made, sold, marketed, used, or imported for sale by any third party. Valjakka
12 initially filed suit against Netflix on September 13, 2021, in the Western District of Texas. After
13 Netflix filed a motion to transfer suit because Valjakka had filed suit in an improper venue,
14 Valjakka agreed to transfer suit to this District. Valjakka filed an Amended Complaint on May 12,
15 2022. Dkt. 39.

16 Valjakka’s Amended Complaint alleges that “Netflix’s Open Connect program and Netflix
17 websites (e.g., <https://www.netflix.com>)” (the “Accused Instrumentality”—the latter of which
18 encompasses the former— infringe United States Patent Nos. 8,495,167 (“167 patent”) and
19 10,726,102 (“102 patent”) (collectively, the “Asserted Patents”). *Id.* The Accused Instrumentality
20 is an exceptionally complex, multi-component network that offers a diverse range of features that
21 are derived from proprietary technologies wholly apart from Valjakka’s alleged inventions.

22 Valjakka’s damages contentions, with respect to a reasonable royalty, are flawed in multiple
23 respects. Most fundamentally, Valjakka’s damages contentions contain almost no detail and
24 provide no analysis or factual support for its proposed 22% reasonable royalty rate and damages
25 award of approximately [REDACTED]. Instead, Valjakka arbitrarily bases its proposed 22%
26 reasonable royalty rate on a single website showing intellectual property royalty rates from an
27 unknown time period and for unknown assets, unknown licenses, and unknown technologies based

1 on undisclosed data. *See Valjakka's Revised Disclosure of Damages Contentions* ("Damages
 2 Contentions") at 17–18 ("For example, this link (also see Exhibit C) <https://lawexplores.com/court-awarded-royalty-rates/> shows royalty rates awarded in court for computer/electronics industry from
 3 1990-2006. The number of awards was 38, with a high of 42%, median of 6.5%, and mean of
 4 11.01%."). The Federal Circuit has "determined that a patentee [can] not rely on license agreements
 5 that [are] 'radically different from the hypothetical agreement under consideration' to determine a
 6 reasonable royalty." *See Uniloc USA, Inc. v. Microsoft Corp.*, 632 F.3d 1292, 1317 (Fed. Cir. 2011)
 7 (quoting *Lucent Techs., Inc. v. Gateway, Inc.*, 580 F.3d 1301, 1327 (Fed. Cir. 2009)). "[T]he
 8 'licenses relied on by the patentee in proving damages [must be] sufficiently comparable to the
 9 hypothetical license at issue . . .' and [] the patentee's failure to do so 'weighs strongly against . . .'
 10 relying on such non-comparable licenses[.]" *Id.* at 1316 (second alteration in original) (internal
 11 citations omitted); *see also ResQNet.com, Inc. v. Lansa, Inc.*, 594 F.3d 860, 870–72 (Fed. Cir. 2010)
 12 (holding that licenses unrelated to the claimed invention could not form the basis for a reasonable
 13 royalty calculation). Valjakka improperly uses alleged industry rates that are unrelated to any facts
 14 and circumstances of the matter at hand. *See Uniloc*, 632 F.3d at 1317 ("Relying on the 25 percent
 15 rule of thumb in a reasonable royalty calculation is far more unreliable and irrelevant than reliance
 16 on parties' unrelated licenses, which we rejected in *ResQNet* and *Lucent Technologies*. There, the
 17 prior licenses at least involved the same general industry and at least some of the same parties as
 18 the hypothetical negotiations at issue, and in *Wordtech* even involved licenses to the patents in suit
 19 entered into by the patentee-plaintiff.").

20 Further, Valjakka fails to apportion damages and instead improperly relies upon the entire
 21 market value of the "entire streaming platform of Netflix that uses the Open Connect Platform."
 22 Damages Contentions at 4–5, 16; *see Finjan, Inc. v. Blue Coat Sys., Inc.*, 879 F.3d 1299, 1310–11
 23 (Fed. Cir. 2018) (citation omitted) ("The smallest salable unit principle directs that 'in any case
 24 involving multi-component products, patentees may not calculate damages based on sales of the
 25 entire product, as opposed to the smallest salable patent-practicing unit, without showing that the
 26 demand for the entire product is attributable to the patented feature.'"). This is particularly
 27

1 problematic because the allegedly infringing patented features are not the basis of consumer
 2 demand, and Valjakka has offered no evidence that the sales of the Accused Instrumentality are
 3 driven by use of the accused functionality. *See id.* at 1311 (“[T]he ‘ultimate reasonable royalty
 4 award must be based on the incremental value that the patented invention adds to the end product.’”)
 5 (quoting *Ericsson, Inc. v. D-Link Sys., Inc.*, 773 F.3d 1201, 1226 (Fed. Cir. 2014)). Valjakka thus
 6 fails to isolate the value of the accused technology, which has resulted in a damages demand that
 7 greatly exceeds the value of the patented technology.

8 Valjakka’s Damages Contentions also do not address what the proper royalty base should
 9 be, let alone address what the smallest salable unit is. Valjakka thus fails to address apportionment
 10 or the need to properly isolate the value of the accused technology, particularly in light of the
 11 countless non-accused features that are found in the Accused Instrumentality as well as the non-
 12 accused functionality offered by Netflix that provides value to its streaming service. Indeed, the
 13 value, demand, and revenue for the Accused Instrumentality is driven more by Netflix’s content
 14 and service offerings than by any technology underlying its content delivery networks. *See, e.g.*,
 15 NFX-VALJ-00007019 at 7024 (“If consumers do not perceive our service offering to be of value,
 16 including if we introduce new or adjust existing features, adjust pricing or service offerings, or
 17 change the mix of content in a manner that is not favorably received by them, we may not be able
 18 to attract and retain members.”).

19 Moreover, the claimed patents are directed to functionality that can potentially be designed
 20 around for a *de minimis* amount if the patent claims are not invalidated or if Netflix is found to
 21 infringe. The ’102 patent relates to the use of multiple digital rights management keys to obtain
 22 access to restricted content, and the ’167 patent relates to the distribution of content, using transport
 23 requests, through a tree of terminal devices.¹ To be clear, Netflix does not believe its accused
 24 system directly, indirectly, or willfully infringes the patented technology and also does not believe
 25 the asserted patent claims to be valid. *See* Dkts. 51, 54.

26 Given the lack of evidence supporting Valjakka’s baseless [REDACTED] damages award,

27
 28 ¹ According to Valjakka, the ’167 patent expired in July 2022 so a design-around would not be required for this patent.

1 Netflix contends that the appropriate royalty is zero dollars. *See TecSec, Inc. v. Adobe Inc.*, 978
 2 F.3d 1278, 1291 (Fed. Cir. 2020) (“[35 U.S.C. § 284] does not require an award of damages if none
 3 are proven that adequately tie a dollar amount to the infringing acts.”). Moreover, in view of
 4 Valjakka’s deficient damages contentions, Netflix reserves all rights to supplement, clarify, amend,
 5 or correct any or all of the responsive damage contentions herein.

6 II. THE ASSERTED PATENTS

7 Valjakka’s Amended Complaint alleges that the Accused Instrumentality infringes the ’167
 8 and ’102 patents. The assignment chains of both the ’167² and the ’102³ patents raise cause for
 9 concern. The ’167 patent issued on July 23, 2013, and is entitled “Data Communications Networks,
 10 Systems, Methods and Apparatus.” The assignment agreement for the ’167 patent, signed in 2021,
 11 does not provide a right to sue for past infringement or collect past damages. Thus, Valjakka is not
 12 entitled to past damages that occurred prior to the assignment agreement. The ’102 patent issued
 13 on July 28, 2020, and is entitled “Method of and System for Providing Access to Access Restricted
 14 Content to a User.” The assignment agreement for the ’102 patent, signed on December 28, 2021,
 15 does not provide a right to sue for past infringement or collect past damages. According to Valjakka,
 16 the ’167 patent expired in July 2022, and the ’102 patent expires in 2025.

17 Further, Valjakka lacks standing to assert the ’167 Patent. This patent enjoys a
 18 complicated assignment history, but Netflix has recently uncovered evidence (in Finnish, and not
 19 in the PTO records) that demonstrates that Valjakka is not the owner. In 2009, Lauri Valjakka
 20 brought suit in the Helsinki District Court against the bankruptcy estate of Suomen Biisi Oy
 21 (“Suomen”) to prohibit their use of patent EP 1421759 (“the ’759 patent”), which is the European
 22 equivalent of the ’167 patent. LV002216 at LV002222; NFX-VALJ-00011076 at 11079. Ruling
 23 against Valjakka, the Helsinki District Court held that the ’759 European Patent, and all other
 24 patents relating to the invention, belonged to Suomen. LV002216 at LV002222; 2225; NFX-
 25 VALJ-00011076 at 11079, 11086. Specifically, the court found that Valjakka had retroactively

27 ² See LV2_001108; LV2_000220; LV2_000222; LV2_000415; LV2_002913; LV2_001026;
 28 ³ See LV2_000231; LV2_001031; LV2_000423; LV2_000234; and LV2_001034.

1 transferred the patent rights to Suomen in 2006. *Id.* (“In the deed of transfer of the patent . . . it
 2 was agreed between e-3 Systems Oy and [Suomen] on 8/21/2006 that e-3 Systems Oy conveys all
 3 rights based on the patent to [Suomen]. The agreement has been signed by on behalf of e-3
 4 Systems Oy by Lauri Valjakka and on behalf of [Suomen] by Juha Setälä. The transfer has taken
 5 effect retroactively, i.e. from 11/16/2005.”). In other words, the court rejected Valjakka’s
 6 argument that the patent rights for the ’759 patent, and related patents (i.e., the ’167 patent),
 7 belonged to him as a result of a utilization agreement dated 12/20/2005. *Id.*, NFX-VALJ-
 8 00011076 at 11087 (“The District Court considers that the deeds of transfer concerning the
 9 DMTS invention described above and the deed of sale dated 11/16/2005 indicate that all rights
 10 related to patenting of the invention have been transferred to [Suomen] from 11/16/2005.”). In
 11 March 2010, The Helsinki Court of Appeal affirmed the district court’s holding. LV002216 at
 12 2222; NFX-VALJ-00011076 at 11081. After Valjakka transferred the patent rights from e-3
 13 Systems to Suomen in 2007, those rights never reverted back to Valjakka via the 12/20/2005
 14 utilization agreement—in other words, Valjakka does not own the ’167 Patent and cannot seek
 15 damages.

16 **III. THE DATE OF THE HYPOTHETICAL NEGOTIATION**

17 The only method cited by Valjakka to calculate an alleged reasonable royalty is the use of
 18 the *Georgia Pacific* factors in the context of a hypothetical negotiation dating to January 2016.
 19 Valjakka, however, has not provided any support for why this date is appropriate, and Netflix is
 20 unable to verify this date or any licensor at the time of this purported 2016 negotiation. Netflix thus
 21 contests the propriety of the January 2016 date. In a *Georgia Pacific* analysis, the date of the
 22 hypothetical negotiation is the date of the alleged first infringement. Netflix’s Open Connect
 23 platform was released around June 2012, and the Asserted Patents issued in July 2013 (’167) and
 24 July 2020 (’102). *See, e.g.*, Techcrunch.com, *Netflix Rolls Out Its Own CDN: OpenConnect* (June
 25 4, 2012), <https://techcrunch.com/2012/06/04/netflix-open-connect/>. Thus, it is unclear what
 26 Valjakka is relying on to support a January 2016 date for the hypothetical negotiation. Netflix
 27 invites Valjakka to provide the legal and factual basis for its proposed hypothetical negotiation

1 date.

2 **IV. THE ROYALTY BASE: THE ENTIRE MARKET VALUE RULE IS NOT
3 APPLICABLE**

4 Typically, the determination of a reasonable royalty is a two-part process. The first step is
5 to determine the appropriate royalty base, which may be confined to the smallest salable patent-
6 practicing unit or may require apportionment of that unit in order to exclude the value of technology
7 or features that are not accused of infringement. The second step is to determine the appropriate
8 royalty rate to apply to the royalty base.

9 The entire market value rule does not apply to this case. The entire market value rule is a
10 “narrow exception” to the general rule that where a small element of a multi-component product is
11 accused of infringement, “royalties [must] be based not on the entire product, but instead on the
12 smallest salable patent-practicing unit.” *LaserDynamics, Inc. v. Quanta Computer, Inc.*, 694 F.3d
13 51, 67 (Fed. Cir. 2012) (citation and quotation marks omitted). The entire market value rule
14 exception allows that “[i]f it can be shown that the patented feature drives demand for an entire
15 multi-component product, a patentee may be awarded damages as a percentage of revenues or
16 profits attributable to the entire product.” *Id.* The patent holder has the burden of proving this
17 requirement is met. *Power Integrations, Inc. v. Fairchild Semiconductor Int'l, Inc.*, 894 F.3d 1258,
18 1272 (Fed. Cir. 2018).

19 The importance of identifying the appropriate royalty base cannot be overstated because the
20 risk of improperly compensating the patent-holder for technologies unrelated to the Asserted
21 Patents is high. As the Federal Circuit has said, “[w]here small elements of multi-component
22 products are accused of infringement, calculating a royalty on the entire product carries a
23 considerable risk that the patentee will be improperly compensated for non-infringing components
24 of that product.” *LaserDynamics*, 694 F.3d at 67. Customer demand for complex technology
25 products, such as the Accused Instrumentality in this case, is driven by numerous considerations
26 and the value of such a product is rarely based on a single feature or function. For this and other
27 reasons, the entire market value rule is not appropriate here. In addition, Valjakka has not shown

1 (or even attempted to show) that the accused technology drives customer demand for the Accused
 2 Instrumentality, nor has Valjakka come close to demonstrating that the accused technology is the
 3 basis for such demand. Netflix's only product is its streaming service and the content and service
 4 offerings on the streaming service drive customer demand. Valjakka has entirely failed to account
 5 for how Netflix's content and service offerings drive the value of the Accused Instrumentality
 6 relative to the alleged value of the accused functionalities.

7 **V. THE REASONABLE ROYALTY ANALYSIS⁴**

8 Since the objective of a reasonable royalty analysis is aimed at assessing the value of the
 9 patented technology as distinct from technology, features, and other considerations not covered by
 10 the asserted patent, determination of the reasonable royalty must include considerations of
 11 apportionment. *See, e.g., Virnetx, Inc. v. Cisco Sys., Inc.*, 767 F.3d 1308, 1326 (Fed. Cir. 2014)
 12 (quoting *Garretson v. Clark*, 111 U.S. 120, 121 (1884)) (“a patentee ‘must in every case give
 13 evidence tending to separate or apportion the defendant’s profits and the patentee’s damages
 14 between the patented feature and the unpatented features’”). Apportionment recognizes the
 15 economic reality that many factors contribute to the revenue⁵ and market success associated with

16 ⁴ Netflix intends to rely on the report and testimony of expert Nisha Mody; *see also* June 1–2, 2023
 17 Deposition of Lauri Valjakka Vols. 1–2; June 2, 2023 Deposition of Ishaan Shastri; May 26, 2023
 18 Deposition of Haripriya Murthy; June 7, 2023 Deposition of Iiro Karesniemi; *see also* forthcoming
 19 deposition of Michael Mutter, June 13, 2023; forthcoming deposition of Karen Casella, June 14,
 20 2023; and forthcoming deposition of Helen Ponce, June 16, 2023.

21 ⁵ *See* NFX-VALJ-00007111; NFX-VALJ-00006610; NFX-VALJ-00006686; NFX-VALJ-
 22 00006694; NFX-VALJ-00006768; NFX-VALJ-00006846; NFX-VALJ-00006924; NFX-VALJ-
 23 00007019; NFX-VALJ-00010704; NFX-VALJ-00010707; NFX-VALJ-00010709; NFX-VALJ-
 24 00010711; NFX-VALJ-00010713; NFX-VALJ-00010715; NFX-VALJ-00010719; NFX-VALJ-
 25 00010721; NFX-VALJ-00010723; NFX-VALJ-00010731; NFX-VALJ-00010733; NFX-VALJ-
 26 00010735; NFX-VALJ-00010737; NFX-VALJ-00010739; NFX-VALJ-00010741; NFX-VALJ-
 27 00010743; NFX-VALJ-00010745; NFX-VALJ-00010749; NFX-VALJ-00010751; NFX-VALJ-
 28 00010753; NFX-VALJ-00010755; NFX-VALJ-00010757; NFX-VALJ-00010759; NFX-VALJ-
 00010761; NFX-VALJ-00010763; NFX-VALJ-00010765; NFX-VALJ-00010767; NFX-VALJ-
 00010769; NFX-VALJ-00010771; NFX-VALJ-00010781; NFX-VALJ-00010783; NFX-VALJ-
 00010785; NFX-VALJ-00010787; NFX-VALJ-00010789; NFX-VALJ-00010791; NFX-VALJ-
 00010794; NFX-VALJ-00010796; NFX-VALJ-00010798; NFX-VALJ-00010800; NFX-VALJ-
 00010802; NFX-VALJ-00010806; NFX-VALJ-00010808; NFX-VALJ-00010810; NFX-VALJ-
 00010812; NFX-VALJ-00010814; NFX-VALJ-00010817; NFX-VALJ-00010819; NFX-VALJ-
 00010821; NFX-VALJ-00010823; NFX-VALJ-00010825; NFX-VALJ-00010827; NFX-VALJ-
 00010829; NFX-VALJ-00010831; NFX-VALJ-00010833; NFX-VALJ-00010835; NFX-VALJ-
 00010837; NFX-VALJ-00010839; NFX-VALJ-00010841; NFX-VALJ-00010844; NFX-VALJ-
 00010846; NFX-VALJ-00010848; NFX-VALJ-00010850; NFX-VALJ-00010852; NFX-VALJ-

1 an overall product or process. Here, there are many features of the Accused Instrumentality that are
 2 not accused of infringement. In addition, Netflix expects that there are numerous other factors
 3 contributing to revenue and the success of the Accused Instrumentality that should also be evaluated
 4 in an apportionment analysis to determine if it is appropriate to limit the royalty base further by
 5 isolating and excluding such elements. These factors include, *inter alia*, features covered by other
 6 patents, non-patented features, reliability, Netflix's content and service offerings, Netflix's own
 7 intellectual property (including its trademarks, copyrights, trade secrets, and patents), brand
 8 reputation, marketing and sales efforts, and manufacturing quality and capability.⁶

9 Undertaking a full apportionment analysis at this time would be premature given that
 10 Valjakka has yet to identify the precise functionality or hypothetical combinations of Netflix's
 11 Open Connect system that Valjakka contends practices the asserted claims of the Asserted Patents.
 12 Nonetheless, based on the limited information available to date, Netflix expects that any reasonable
 13 royalty analysis must apportion the value of accused functionality to exclude the multitude of non-
 14 accused functionalities, in order to arrive at the appropriate royalty base to which a royalty rate may
 15 be applied. The result may then be multiplied by the percentage of the accused functionality that is
 16 devoted to the Accused Instrumentality. In arriving at a royalty rate as part of the royalty analysis,
 17 various factors may be assessed, including, *inter alia*, technology, licensing, financial, and
 18 market/competitive considerations. While this method—an apportioned royalty base that begins
 19 with the smallest salable patent-practicing unit and excludes non-accused technology, multiplied
 20 by an applicable royalty rate—is offered as one example of how the reasonable royalty may be
 21 calculated, it is substantially more accurate and reasonable than the conclusory figures presented

22
 23 00010854; NFX-VALJ-00010856; NFX-VALJ-00010858; NFX-VALJ-00010860; NFX-VALJ-
 24 00010862; NFX-VALJ-00010866; NFX-VALJ-00010868; NFX-VALJ-00010870; NFX-VALJ-
 00010872; NFX-VALJ-00010887; NFX-VALJ-00010924; NFX-VALJ-00010925; NFX-VALJ-
 00010926; NFX-VALJ-00010927; NFX-VALJ-00010928 and NFX-VALJ-00010929.

25 See NFX-VALJ-00010930; NFX-VALJ-00010949; NFX-VALJ-00010958; NFX-VALJ-
 00010973; NFX-VALJ-00010973; NFX-VALJ-00010987; NFX-VALJ-00010991; NFX-VALJ-
 00010997; NFX-VALJ-00011001; NFX-VALJ-00010183; NFX-VALJ-00010215; NFX-VALJ-
 00010243; NFX-VALJ-00010298; NFX-VALJ-00010303; NFX-VALJ-00010364; NFX-VALJ-
 00010424; NFX-VALJ-00010434; NFX-VALJ-00010439; NFX-VALJ-00010470; NFX-VALJ-
 00010497; NFX-VALJ-00010548; NFX-VALJ-00010556; NFX-VALJ-00010564; NFX-VALJ-
 00010572; and NFX-VALJ-00010643.

1 by Valjakka based on the entire market value rule, which are devoid of any analysis as to the
 2 smallest salable unit or apportionment.

3 VI. THE *GEORGIA PACIFIC* FACTORS

4 Regardless, the information provided by Valjakka under the *Georgia Pacific* Factors is
 5 insufficient, lacks analysis, and does not meet the disclosure requirements of Patent L.R. 3-8. See
 6 *Twilio, Inc. v. Telesign Corp.*, No. 16-cv-06925, 2017 WL 5525929, at *2 (N.D. Cal. Nov. 17,
 7 2017) (“The requirements of L.R. 3-8 could not be more clear: identify the theories of recovery;
 8 identify the known facts that support the theories; do the math.”); Pat. L.R. 3-8.

9 **FACTOR 1: The royalties received by the patentee for the licensing of the patent in suit,**
 10 **proving or tending to prove an established royalty.**

11 Valjakka’s Damages Contentions state that, “Valjakka has, as part of prior lawsuits
 12 involving the patents-in-suit, settled with defendants for lump-sum payments.” Any transactions
 13 including the Asserted Patents, even ones negotiated during litigation, may be relevant to a
 14 reasonable royalty analysis. *ResQNet.com*, 594 F.3d at 869. Valjakka has produced the following
 15 licenses bearing Bates numbers LV004030; LV004038; LV004058; LV004070; LV2_002242;
 16 LV2_000410; NFX-VALJ-00011042; LV2_000799; and NFX-VALJ-00011047. Netflix may also
 17 rely on additional valuations Valjakka obtained relating to the Asserted Patents bearing Bates
 18 numbers LV002102; NFX-VALJ-00011069; LV004243; and LV2_000600.

19 **FACTOR 2: The rates paid by the licensee for the use of other patents comparable to the**
 20 **patent in suit.**

21 Netflix produced multiple licenses bearing Bates numbers NFX-VALJ-007142, NFX-
 22 VALJ-00007162, NFX-VALJ-00007177, NFX-VALJ-00007186, NFX-VALJ-00007192, NFX-
 23 VALJ-00007198, NFX-VALJ-00007222, NFX-VALJ-00007236, and NFX-VALJ-00010173.
 24 Whether a license is technically or economically comparable is subject to expert opinions and will
 25 be disclosed at the appropriate time. However, Netflix expects to present a comparable license
 26 analysis based on at least these licenses if they are found to be technically and economically
 27 comparable.

1 **FACTOR 3: The nature and scope of the license, as exclusive or non-exclusive; or as restricted**
 2 **or non-restricted in terms of territory or with respect to whom the manufactured product**
 3 **may be sold.**

4 Valjakka has stated that settlements relating to the patents-in-suit are all lump sum amounts,
 5 and denies that he has ever licensed the Asserted Patents for a running royalty. Damages
 6 Contentions at 3. Netflix thus expects that any hypothetical negotiation outcome would result in an
 7 upfront lump sum payment. To the degree any adjustments are necessary from the comparable
 8 licenses to the hypothetical negotiation, they will be addressed in the appropriate GP factor area,
 9 including adjustments associated with exclusivity and possibly field of use.

10 **FACTOR 4: The licensor's established policy and marketing program to maintain his patent**
 11 **monopoly by not licensing others to use the invention or by granting licenses under special**
 12 **conditions designed to preserve that monopoly.**

13 Valjakka states that “Valjakka’s policy” is that he is “willing to license the patents for a
 14 reasonable royalty for third parties who are using the technology in order to maintain his patent
 15 monopoly.” *Id.* at 6. Valjakka, however, is a non-practicing entity and therefore has no monopoly
 16 to protect. Finally, given Valjakka’s admission, he should produce any documents related to or
 17 supporting his alleged patent licensing “polic[ies],” including any such policies or practices that
 18 have guided the negotiations of any settlement agreements.

19 **FACTOR 5: The commercial relationship between the licensor and licensee, such as, whether**
 20 **they are competitors in the same territory in the same line of business; or whether they are**
 21 **inventor and promoter.**

22 Valjakka admits that he is not a competitor to Netflix and that he does not produce any
 23 products. However, absent the production of Valjakka’s transactions regarding the patents in suit,
 24 any adjustment based on those transactions is presently unknown.

25 **FACTOR 6: The effect of selling the patented specialty in promoting sales of other products**
 26 **of the licensee; the existing value of the invention to the licensor as a generator of sales of his**
 27 **non-patented items; and the extent of such derivative or convoyed sales.**

1 Valjakka appears to misunderstand Factor 6 and thus appears to be overstating the alleged
 2 contribution of the Asserted Patents. In particular, Valjakka states that, “because of the patented
 3 Valjakka technology, Netflix was able to deliver content around the world on any device
 4 simultaneously with very little additional internet traffic, and Netflix considered this feature, ‘a
 5 great Netflix viewing experience’ important enough to write a press release discussing the topic.”
 6 Damages Contentions at 8. Valjakka thus improperly conflates Netflix’s entire content delivery
 7 system with the technology of the two Asserted Patents, without any basis that these separate
 8 systems can be equated from either a technical or damages perspective. Valjakka’s statement is a
 9 clear violation of the entire market value rule. *Versata Software, Inc. v. SAP Am., Inc.*, 717 F.3d
 10 1255, 1268 (Fed. Cir. 2013) (citation omitted) (“A patentee may assess damages based on the entire
 11 market value of the accused product only where the patented feature creates the basis for customer
 12 demand or substantially creates the value of the component parts.”). Indeed, many other factors and
 13 non-accused functionalities, besides the patented functionality, drive the value of the Accused
 14 Instrumentality, including Netflix’s content and service offerings. Because Valjakka has failed to
 15 provide any evidence or analysis of apportionment, any response to Valjakka’s assertions with
 16 respect to Factor 6 would be premature.

17 **FACTOR 7: The duration of the patent and the term of the license.**

18 According to Valjakka, the ’167 patent expired in July 2022 and the ’102 patent expires in
 19 2025. Damages Contentions at 8.

20 **FACTOR 8: The established profitability of the product made under the patent; its
 21 commercial success; and its current popularity.**

22 Valjakka provided no relevant evidence or argument under this factor. Simply providing
 23 information on Netflix’s net sales is not only a violation of the entire market value rule—it also
 24 fails to provide any analysis of nexus to the Asserted Patents. Moreover, Valjakka explained that
 25 he “did develop a working software system for the patented systems, however Valjakka’s system
 26 is currently not being used by a third party.” Damages Contentions at 6. The failure of Valjakka to
 27 commercialize its purported system suggests a lack of commercial success of the patented

1 technology.

2 While Netflix has been a successful business, and has realized profits, Netflix's commercial
 3 success is not the result of Valjakka's technology. Many factors contribute to Netflix commercial
 4 success including branding, content offerings, and more. Even assuming infringement and validity
 5 of claims, none of these factors associated with Netflix commercial success are due to any
 6 contribution by the Asserted Patents. Regardless, the appropriate measure of any commercial
 7 success or profitability is operating profit and not gross profit.

8 **FACTOR 9: The utility and advantages of the patent property over the old modes or devices,**
 9 **if any, that had been used for working out similar results.**

10 Valjakka admits that "no third-party commercial users licensed or adopted the technology
 11 from Valjakka." Damages Contentions at 12; *see also id.* at 6. As such, there appears to be little, if
 12 any, benefits to the patents in suit.

13 Additionally, Netflix could have designed around the patent in suit in a simple way for little
 14 to no costs. While premature in these initial damages contentions, Netflix experts are expected to
 15 consider design arounds and non-infringing alternatives. Finally, with respect to Factor 9 and/or
 16 13, Netflix experts may offer a cost-based approach to damages analysis.⁷

17 **FACTOR 10: The nature of the patented invention; the character of the commercial**
 18 **embodiment of it as owned and produced by the licensor; and the benefits to those who have**
 19 **used the invention.**

20 Netflix incorporates its response to Factors 8 and 9.

21 **FACTOR 11: The extent to which the infringer has made use of the invention; and any**
 22 **evidence probative of the value of that use.**

23 Netflix incorporates its response to Factors 8 and 9.

24 **FACTOR 12: The portion of the profit or of the selling price that may be customary in the**
 25 **particular business or in comparable businesses to allow for the use of the invention or**
 26 **analogous inventions.**

27

28 ⁷ See NFX-VALJ-00010930.

1 As discussed earlier, Valjakka arbitrarily bases its proposed 22% reasonable royalty rate on
 2 a single website showing intellectual property royalty rates from an unknown time period and for
 3 unknown assets, unknown licenses, and unknown technologies based on undisclosed data. *See*
 4 Damages Contentions at 17–18. As discussed above, because Valjakka’s proposed royalty rate is
 5 completely divorced from any facts or circumstances related to the matter at hand, and because
 6 Valjakka fails to properly apportion, the information provided by Valjakka under Factor 12 has no
 7 nexus to the relevant facts and would not assist a trier of fact.

8 **FACTOR 13: The portion of the realizable profit that should be credited to the invention as**
 9 **distinguished from non-patented elements, the manufacturing process, business risks, or**
 10 **significant features or improvements added by the infringer.**

11 Valjakka has provided no evidence or argument under Factor 13. For example, Valjakka has not
 12 specified the novel portion of the ’102 or ’167 patents that provides incremental value. *See Finjan*,
 13 879 F.3d at 1310 (“[T]he patentee must give evidence tending to separate or apportion the
 14 infringer’s profits and the patentee’s damages between the patented feature and the unpatented
 15 features, and such evidence must be reliable and tangible, and not conjectural or speculative.”)
 16 (citation and internal quotation marks omitted). Valjakka instead identifies the entirety of Netflix’s
 17 Open Connect system and its streaming platform as the smallest saleable unit or the smallest
 18 patented article, and assumes that “all revenue listed” in an Excel spreadsheet showing Netflix’s
 19 gross revenue, costs, and net revenue can be “assumed to be from subscriptions that stream content
 20 to users over Open Connect”—in violation of the entire market value rule. Damages Contentions
 21 at 16. While Valjakka acknowledges, “[a]pportionment is a proper analysis in reasonable royalty
 22 calculations,” *id.* at 16, Valjakka does not even attempt to provide any evidence or analysis for
 23 apportionment.

24 **FACTOR 14: The opinion testimony of qualified experts.**

25 Valjakka provided no evidence or argument under Factor 14.

26 **FACTOR 15: The amount that a licensor (such as the patentee) and a licensee (such as the**
 27 **infringer) would have agreed upon (at the time the infringement began) if both had been**

1 **reasonably and voluntarily trying to reach an agreement; that is, the amount that a prudent**
 2 **licensee—who desired, as a business proposition, to obtain a license to manufacture and sell**
 3 **a particular article embodying the patented invention—would have been willing to pay as a**
 4 **royalty and yet be able to make a reasonable profit and which amount would have been**
 5 **acceptable by a prudent patentee who was willing to grant a license.**

6 Because Valjakka has failed in its damages disclosures to provide any cogent analysis on
 7 damages, and has failed to produce relevant information regarding patent transactions, Netflix can
 8 provide no further contentions at this time. From Netflix's perspective, the Parties were not and are
 9 not competitors, and the alleged patented features are not market drivers. At best, the most relevant
 10 damages calculation is likely based on the sales and licensing transactions that include the Asserted
 11 Patents. Netflix expects that in the event it is found to be infringing non-invalidated patent claims,
 12 damages would be in the form of a small fully paid-up lump sum payment that would cover the
 13 period from when notice was provided to when the patents expire.

14 Furthermore, Valjakka's briefing in its damages contentions of the "parameters for treble
 15 damages is unnecessary" because "Local Rule 3-1 already requires that a party set forth the basis
 16 for an allegation of willful infringement." *See, e.g., Twilio*, 2017 WL 5525929, at *3. Nonetheless,
 17 Netflix denies that it willfully infringes the Asserted Patents or that this is an exceptional case. *See*
 18 Dkts. 51, 54.

19 **VII. VALJAKKA'S CONTENTIONS FAIL TO SATISFY PATENT L.R. 3-8**

20 Valjakka has failed to provide the requisite documentation, computations, and/or analysis,
 21 as required under Patent L.R. 3-8. *See, e.g., Finjan, Inc. v. Cisco Sys. Inc.*, No. 17-cv-00072, 2019
 22 WL 1168536, at *1 (N.D. Cal. Mar. 13, 2019) ("An important function of this District's damages
 23 contention requirement is to provide damages information 'early enough in the course of fact
 24 discovery to inform the parties and the court on issues of relevance and proportionality,'" as well
 25 as to "'create[] a potential opportunity for meaningful settlement discussions.'"') (alteration in
 26 original) (quoting *Twilio*, 2017 WL 5525929, at *2)); *see also Twilio*, 2017 WL 5525929, at *3
 27 ("'[I]t simply is not credible that a full year after the filing of the complaint, which certainly followed

1 a diligent investigation, a plaintiff is unable to quantify, with reasonableness if not certainty, the
 2 damages it will seek at trial. Nor is it credible that a plaintiff cannot break that quantification into
 3 elements of a computation: a royalty base, a royalty rate, and other potential factors that will
 4 compose its alleged damages.”). Most notably, Valjakka has failed to provide any facts relating to
 5 apportionment in its Damages Contentions. *Id.* (“Nevertheless, the apportionment requirement does
 6 not obviate the need to compute damages under L.R. 3-8. A plaintiff should, at a minimum, identify
 7 the likely factors that will be considered in its apportionment calculation, quantify those factors to
 8 the extent possible, and identify the outstanding discovery directed to quantifying these factors with
 9 the particularity outlined above.”). Additionally, Valjakka has failed to provide evidence of
 10 compliance with the marking requirements in 35 U.S.C. § 287. Further, in the interests of
 11 facilitating damages discovery, providing proper notice of Valjakka’s theory of damages, and
 12 promoting potential settlement negotiations, Netflix requests that Valjakka provide the following
 13 categories of information and documents. As discovery is ongoing, Netflix reserves the right to
 14 supplement or amend its contentions after receipt of the requested information and documents,
 15 including the following:

- 16 1) The identification of each of Valjakka’s asserted damages theories (e.g., lost profits,
 17 reasonable royalty, interest and any other asserted theory), as well as the amount of
 18 damages Valjakka seeks under each damages theory. *See Corning Optical*
 19 *Comm’ns Wireless Ltd. v. Solid, Inc.*, 306 F.R.D. 276, 278–79 (N.D. Cal. 2015).
- 20 2) All documents related to a good faith computation of a reasonable royalty, including
 21 identification of the “royalty base(s), royalty rate(s), date(s) of the hypothetical
 22 negotiation currently used, [and] factors identified to date that are or will be used in
 23 apportionment, and where possible a quantification of those factors.” *See Twilio*,
 24 2017 WL 5525929, at *5; *Intel Corp. v. Tela Innovations, Inc.*, No. 18-cv-02848,
 25 2021 WL 1222622, at *29 (N.D. Cal. Feb. 11, 2021) (noting that while plaintiff
 26 “fairly disclosed” a “broad theory” of damages that included “royalty rates based on

- [defendant's] sales," Rule 3-8 "requires 'computations of damages'" and "'the manner and result of how [plaintiff] now calculates damages was not disclosed')."
- 3) All offers to license the patents in suit, sell the patents in suit, or transfer the patents in suit.
 - 4) All licenses or transactions of any sort involving the patents in suit including discussions or negotiations regarding those licenses and the results of any settlements.
 - 5) All documents or communications related to Valjakka's patent licensing and/or settlement policies and practices.
 - 6) Any valuations of the patents in suit.
 - 7) All income statements, sales data, profitability data, market research reports, competitive analyses supporting Valjakka's contentions that Valjakka tried to have "third-party commercial users" license or adopt the technology from him.
 - 8) Demonstration of commercial success of the patents in suit, or any technologies that embody the patents in suit, including adoption of the patents in suit by others.
 - 9) Any documents that identify demand for the patents in suit.
 - 10) Any consumer surveys or any documentation showing use of the patented inventions.
 - 11) Any documents supporting actual or constructive notice of the patents from Valjakka, including any alleged evidence of compliance with the marking requirements of 35 U.S.C. § 287.
 - 12) Information, data, documentation, and identification of benefits and functionalities of the patents in suit.
 - 13) For each patent in suit, the time period for which Valjakka seeks damages as a result of the alleged infringement.
 - 14) Any and all documents that support Valjakka's claim that the hypothetical negotiation would have occurred in 2016. *See Twilio*, 2017 WL 5525929, at *5.

1
2 Dated: June 15, 2023

Respectfully submitted,

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20
21 **Attorneys for Defendant**
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CERTIFICATE OF SERVICE

I, the undersigned, declare:

I am a citizen of the United States and employed by the firm of Perkins Coie LLP in San Alameda, California. I am over the age of eighteen years and not a party to the within-entitled action. On June 15, 2023, I served a copy of the within document(s):

- DEFENDANT NETFLIX, INC.’S PATENT L.R. 3-9 RESPONSIVE DAMAGES CONTENTIONS

8 ☒ by transmitting via e-mail or electronic transmission the document(s) listed above to the person(s) at the e-mail address(es) set forth below.

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I declare that I am employed in the office of a member of the bar of this court at whose
direction the service was made.

Executed on June 15, 2023.

Elise S. Edlin